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No. 06-144

IN THE

Supreme Court of the United States

BASF CORPORATION,
Petitioner,

v.

RONALD PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Sup. Ct. R. 37.2(b), CropLife America hereby moves for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Counsel for Petitioner BASF Corporation has consented to the filing of the brief (a copy of Petitioner's written consent has been filed with the Clerk's office), but Respondents' counsel has withheld consent, thereby necessitating this motion.

CropLife America is the national trade association for the plant science industry. Its member companies produce, sell, and distribute virtually all of the agricultural crop protection pesticides, including herbicides, insecticides, and fungicides, which American farmers use to provide consumers with abundant food and fiber. The association is committed to safe and responsible use of the industry's products. To

achieve that objective, pesticide products must be used in accordance with nationally uniform product labeling regulated by the United States Environmental Protection Agency (EPA) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

The subject of this appeal—FIFRA preemption of state-law damages claims that conflict with EPA's regulation of pesticide labeling—is of utmost importance to CropLife America and its members. During the past 15 years, the association has filed numerous *amicus curiae* briefs addressing the scope and application of FIFRA preemption. CropLife America submitted an *amicus* brief to this Court in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005) (holding that FIFRA's preemption provision, 7 U.S.C. § 136v(b) ("Uniformity"), expressly preempts state law damages claims which impose requirements for labeling that diverge from, and are not substantially equivalent to, FIFRA's labeling requirements), and in support of BASF's pre-*Bates* certiorari petition here, see *BASF Corp. v. Peterson*, 544 U.S. 1012 (2005) (vacating and remanding for further consideration in light of *Bates*).

CropLife America seeks leave to file the accompanying *amicus curiae* brief in order to present its views on why the Minnesota Supreme Court's post-*Bates* remand opinion warrants review. From an industry-wide perspective, there are two principal reasons why review of this case is essential:

First, the state court misread *Bates* in a most fundamental and troublesome way. The Court should take this opportunity to clarify, for the benefit of lower courts and litigants in state-law pesticide damages suits, that *Bates* neither instructs nor allows a court to elevate the name, form, or plaintiff's characterization of a state-law cause of action (e.g., a "consumer fraud" claim) over its nature, elements, or substance (e.g., a claim based on a duty that conflicts with EPA's labeling regulations) to determine whether it imposes "requirements for labeling" for purposes of § 136v(b).

Second, the state court's preemption analysis undermines the structure and disrupts the operation of the federal/state pesticide regulatory scheme, whose principal purpose is to protect human health, the environment, and agricultural crop production. In particular, under the pretext of consumer protection, the opinion holds that a pesticide manufacturer can be held liable under state law for utilizing EPA-authorized subset labeling to identify the crops to which a herbicide may be safely applied, and for advocating compliance with FIFRA's crucial mandate that pesticides be used only in accordance with their labeling.

CropLife America believes that the discussion of these and related points in the accompanying *amicus* brief will be helpful to the Court in deciding whether to grant the certiorari petition. Therefore, this motion for leave to file the *amicus* brief should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT NO FORM OF STATE-LAW CAUSE OF ACTION IS CATEGORICALLY EXCLUDED FROM FIFRA PREEMPTION	4
II. THE COURT SHOULD GRANT REVIEW BECAUSE THE LOWER COURT'S OPINION UNDERMINES THE STRUCTURE AND DISRUPTS THE OPERATION OF THE FEDERAL/STATE PESTICIDE REGULATORY SCHEME	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Aetna Health Inc. v. Davilla, 542 U.S. 200 (2004)	8
Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005)	*passim*
Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	8
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	4
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)	11
Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996)	9
Kuiper v. American Cyanamid Co., 131 F.3d 656 (7th Cir. 1997)	9
Lowe v. Sporicidin Int'l, 47 F.3d 124 (4th Cir. 1995)	9
Mortellite v. Novartis Crop Protection, Inc., No. 03-3847, 2006 WL 2390514 (3d Cir. Aug. 21, 2006)	9, 10
Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002)	8
Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995)	9
Turner v. Chevron USA, Inc., No. B173622, 2006 WL 1314013 (Cal. Ct. App. May 15, 2006), *pet. for review denied* (Cal. Sup. Ct. Aug. 16, 2006) (No. 44553)	10
United States v. Locke, 529 U.S. 89 (2000)	11
Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)	13
Wuebker v. Wilbur-Ellis Co., 418 F.3d 883 (8th Cir. 2005)	10

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS	Page
7 U.S.C. § 136j(a)(2)(G)	18, 19
7 U.S.C. § 136v(a)	12
7 U.S.C. § 136v(b)	*passim*
7 U.S.C. § 136w-1(a)	20
40 C.F.R. § 152.130(a)	18
40 C.F.R. § 152.130(b)	15
40 C.F.R. § 156.10(a)(1)	18
MISCELLANEOUS	
49 Fed. Reg. 37,960 (Sept. 26, 1984)	17
53 Fed. Reg. 15,952 (May 4, 1988)	16
EPA Label Review Manual (3d ed. 2003)	18
Leslie A. Brueckner, *A Turning of the Tide for Preemption*, 41 Trial 28 (Nov. 2005)	10

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BRIEF OF CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Review should be granted because this case provides the Court with an ideal and timely opportunity to clarify a crucial aspect of the Court's opinion in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). More specifically, the Court

[1] Pursuant to Sup. Ct. R. 37.6, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

should grant review to end the widespread confusion surrounding *Bates* by making it clear that nothing in that opinion allows the name, form, or characterization given to a state-law cause of action by a plaintiff to govern whether the claim falls within the scope of FIFRA's preemption provision, 7 U.S.C. § 136v(b).

The Court held in *Bates* that a state-law damages claim imposes a "requirement for labeling" for purposes of § 136v(b) if the legal duty upon which the claim is premised would "set a standard" for a pesticide product's labeling, or require a product to be labeled in a "particular way." 544 U.S. at 444, 445, 446. The Court further indicated that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging.'. . . Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted." *Id.* at 444. In its post-*Bates* opinion on remand, the Minnesota Supreme Court misconstrued this statement to mean that any state-law claim whose name, form, or "characterization" is not "very directly related" or "directly addressed" to a pesticide product's labeling is *categorically* excluded from the preemptive scope of § 136v(b). Pet. App. at 13a. Based on this misreading of *Bates*, the state court failed to analyze the true nature of the legal duties underlying the Respondent farmers' claims, and instead, adopted the farmers' own superficial characterization of their claims as involving "nonlabel" conduct. *Id.* at 19a.

The recurring question of whether the Court in *Bates*, which is being hailed by the trial bar as a landmark realignment of the Court's tort preemption jurisprudence, intended to elevate form over substance and thereby enable a plaintiff to plead around preemption at will, has tremendous practical

importance for any type of pesticide or other state-law damages action where federal preemption is raised as an affirmative defense. While the urgent need to clarify (or correct) this aspect of *Bates* is reason enough to grant review here, the opinion below also warrants the Court's scrutiny because unless reversed, it will severely destabilize the underpinnings of the federal/state pesticide regulatory scheme, stifle innovative activity within the pesticide industry, and impair American farmers' already precarious ability to produce a broad variety of food crops in a cost-effective manner.

There are at least five reasons why the lower court's opinion turns the federal/state scheme on its head: *First*, contrary to *Bates*, the opinion allows individual juries to establish their own *divergent* state-law requirements for the content and format of a pesticide product's nationally uniform labeling, including with regard to listing the agricultural crops to which a product may be lawfully (and safely) applied. *Second*, the opinion transforms a voluntarily obtained FIFRA registration into both an unqualified license and a state law duty to sell a product throughout the United States for all of its federally registered uses; the opinion thereby encroaches upon each state's inherent authority to restrict, based on agricultural, environmental and other factors within its own borders, the sale and use of FIFRA-registered pesticides. *Third*, the opinion undermines FIFRA's fundamental prohibition against using a pesticide in a manner inconsistent with its EPA-approved labeling, such as by applying a product to crops that are not included on its labeling. *Fourth*, the opinion discourages adequate pre-market testing of pesticide products to ensure that they are safe and effective for use on particular types of crops in specific regions. *Fifth*, the opinion eliminates pesticide manufacturers' already tenuous economic incentives for developing and marketing products that are suitable for use on low-acreage "minor" crops such as fruits

and vegetables, which have high economic value to farmers and nutritional benefits for consumers.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT NO FORM OF STATE-LAW CAUSE OF ACTION IS CATEGORICALLY EXCLUDED FROM FIFRA PREEMPTION

In *Bates* this Court articulated a two-part, textually based test for determining whether a state-law damages claim falls within the preemptive scope of § 136v(b) of FIFRA:

> For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement "*for labeling or packaging*" . . . Second, it must impose a labeling or packaging requirement that is "*in addition to or different from* those required under this sub-chapter."

544 U.S. at 444 (quoting 7 U.S.C. § 136v(b)). Addressing the first prong, the Court rejected a label alteration "inducement test" as too subjective, indicating instead that "[a] requirement is a rule of law that must be obeyed . . . . The *proper inquiry* calls for an examination of the *elements of the . . . duty* at issue . . . ." *Id.* at 445 (emphasis added) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523-24 (1992) ("The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the . . . damages action constitutes a 'requirement' . . . ."). Further, "requirements for labeling" are rules which "require[] that manufacturers label . . . their products in [a] *particular way*," *id.* at 444 (emphasis added), in other words, "rules [that] *set a standard* for a product's labeling," *id.* at 446 (emphasis added).

1. The Opinion Below Fundamentally Misconstrues Bates. The Minnesota Supreme Court failed to conduct the

straightforward legal inquiry required by *Bates*. The state court did not ask whether, as a matter of law, the Respondent farmers' damages claims are predicated upon state-law rules that would "set a standard" for BASF's Poast Plus labeling, or require that the product to be labeled "in [a] particular way," for example, by requiring BASF, despite EPA's subset labeling regulation, to list *all* of the product's federally registered crops. Instead, the state court embarked upon the subjective, convoluted, fact-laden exercise of deciding which party's "characterization" of the claims is more accurate, and then allowed Respondents' self-serving characterization to define the nature of the state-law duties imposed by the claims. Plainly misreading *Bates*, the court erroneously asserted that

> in light of the Supreme Court's clarification of the appropriate FIFRA preemption standards, it has become even more apparent that the debate in this case is *not about . . . the legal standard imposed by application of the New Jersey statute* in the context of the farmers' claims. Instead, the fundamental debate is *simply about how the farmers' claims are accurately characterized.* Because we conclude that the *record supports the farmers' characterization* of their claims as based on nonlabel conduct, under *Bates*, there is no FIFRA preemption.

Pet. App. at 18a-19a (emphasis added).

Compounding this error, the opinion below rewrites § 136v(b) by adding the requirement "that state regulation must be *very directly related* to labeling . . . in order to invoke FIFRA preemption. . . . That is, FIFRA preemption applies only if the state requirement on which liability is based is *directly addressed* to labeling . . . ." *Id.* at 13a (emphasis added). This "very directly related" or "directly addressed" to labeling test, which is nowhere to be found in the text of § 136v(b) or in *Bates*, was the "crucial determinant" for the

lower court's conclusion that the farmers' claims should be characterized as being "based on BASF's marketing and advertising actions and not on the content of the product labels." *Id.* at 14a.

Rather than recognizing that the farmers' claims are predicated upon state-law duties that would set standards for Poast Plus labeling and require the product to be labeled in a particular way, the state supreme court's circular discussion of how the claims should be "characterized" merely reflects the consumer fraud veneer which Respondents have applied to their claims in an effort to circumvent § 136v(b).[2] Furthermore, by concluding that the "farmers . . . more accurately characterize the nature of the farmers' claims" as involving "nonlabel conduct," *id.* at 16a, 19a, the state court conveniently avoided the second prong of the *Bates* test, i.e., whether their claims are based on a "rule that would impose a labeling requirement that *diverges from* those set out in FIFRA and its implementing regulations." *Bates*, 544 U.S. at 452 (emphasis added). Had the court addressed this second question, it would have been difficult to reach any conclusion other than that Respondents' claims are based on state-law duties that widely diverge from EPA's labeling regulations, and therefore, establish a state-law standard for labeling that is "in addition to or different from" FIFRA's standards as implemented by EPA. *See* Pet. at 14-19. For the same reason, the state supreme court erred by failing to recognize that as mandated by *Bates*, 544 U.S. at 454, the trial court

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[2] *See, e.g.*, Pet. App. at 17a ("The duty the farmers' claims imposed on BASF was not to register and label Poast and Poast Plus as one product, but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops."); *ibid.* ("[T]he farmers' claims do not challenge the legality of BASF's subset labeling, but rather its misrepresentations about the products, their registration, and their capacities . . . .").

should have instructed the jury regarding FIFRA's and EPA's labeling requirements.

2. This Court Should Clarify Bates by Explicitly Holding That Lower Courts Must Not Place Form Over Substance in Determining Whether a State-Law Cause of Action Is Preempted by § 136v(b) of FIFRA. Consistent with the plain language of § 136v(b), *Bates* clearly holds that a state-law claim must impose a "requirement for labeling" as the first condition for express preemption. 544 U.S. at 444. In other words, any claim that does not impose a "requirement for labeling" is categorically excluded from the scope of § 136v(b). The state court's supposedly "careful reading" of *Bates*, Pet. App. at 12a, goes astray, however, by reading into *Bates* a much broader categorical exclusion for virtually any type of state-law cause of action which does not *facially* attack a pesticide product's labeling. For example, the opinion below found it "significant that the Court [in *Bates*] also made the point that a state requirement applicable to oral statements does not qualify as a requirement for 'labeling or packaging' covered by section 136v(b)." *Ibid.* (citing *Bates*, 544 U.S. 445 n.17). Based on this Court's supposedly "narrow view of the 'labeling or packaging requirement' factor," *ibid.*, the state court indicated that "[t]he conduct at issue is analogous to the oral sales representations that the Supreme Court found in *Bates* to be outside the scope of FIFRA preemption." *Id.* at 17a; *see also id.* at 13a (referring to the Supreme Court's "refusal to view regulation of oral statements, even those that mirror label language, as requirements for labeling").

To be sure, the Court indicated in *Bates* that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or

packaging.'" 544 U.S. at 444. This statement, however, is not equivalent to a holding that state-law causes of action are *categorically* excluded from the preemptive scope of § 136v(b) merely because they are denominated as, or pleaded or presented in the form of, claims for defective design, inadequate testing, breach of warranty—or here, consumer fraud—*even if*, in a particular case, they are based on state-law rules that would set standards for a pesticide product's labeling or otherwise require a product to be labeled in a particular way.

Such a holding would represent a sea change in this Court's tort preemption jurisprudence, which establishes that the substance, not the form, of a state-law claim governs whether it is preempted. *See, e.g., Aetna Health Inc. v. Davilla,* 542 U.S. 200, 214 (2004) ("distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would *elevate form over substance* and allow parties *to evade the pre-emptive scope of [the statute]* simply by relabeling their . . . claims") (internal quotation marks omitted); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (preemption cannot be "avoided by mere artful pleading"). Because pesticide-related damages suits, now reinvigorated by *Bates*, continue to be a persistent feature of this nation's judicial landscape, the Court should grant review in order to clarify for the benefit of lower courts and litigants that *any* state-law damages claim—no matter how characterized, denominated, or formulated—that "set[s] a standard for a product's labeling," *Bates*, 544 U.S. at 446, or "requires that manufacturers label . . . their products in [a] particular way," *id.* at 444, imposes requirements for labeling within the scope of § 136v(b).

Prior to *Bates*, the federal courts of appeals had uniformly recognized that FIFRA preemption cannot be avoided merely by the "guise under which the claim is presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002); *see*

also Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559, 564 (1st Cir. 1996) ("merely to *call* something a design or manufacturing defect claim does not automatically avoid FIFRA's explicit preemption clause"). Along the same lines, the federal courts widely had held that a state-law claim purporting to be based on an oral or other "off-label" statement that repeated information on a product's labeling necessarily imposed state-law requirements for the labeling itself. *See, e.g., Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997) (farmers "cannot automatically avoid FIFRA preemption simply because they challenge alleged misrepresentations that were made separately from the label. . . . even off-label statements are preempted if they merely repeat information in the label itself."); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995) (FIFRA preempts claim based on pesticide distributor's oral representation regarding crop safety where there was "no evidence establishing that [it] made any statements that were inconsistent with or went beyond the labels"); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 127-30 (4th Cir. 1995) (§ 136v(b) preempts claims based on "off-label" representations which do not "substantially differ" from the label).

Now, however, the Minnesota Supreme Court has misconstrued the *Bates* "requirement for labeling" discussion, 544 U.S. at 444-45, as holding that most types of state-law causes of action are categorically excluded from § 136v(b) simply based on the name, form, or characterization that a plaintiff assigns to them.[3] The state supreme court is not alone; other post-*Bates* decisions have made the same critical error. For example, in *Mortellite v. Novartis Crop Protection, Inc.*, No. 03-3847, 2006 WL 2390514 (3d Cir. Aug. 21, 2006), a pesticide-related crop damage case, the Third Circuit read

[3] The state supreme court acknowledged the Court held in *Bates* that fraud and negligent-failure-to-warn claims do impose requirements for labeling. *See* Pet. App. at 10a (citing *Bates*, 544 U.S. at 446).

Bates as *categorically* excluding strict liability, negligent testing, and breach of warranty claims, and also oral misrepresentation claims, from § 136v(b). *See id.*, at *4 ("As the Supreme Court explained, such common law claims plainly do not impose labeling requirements, and therefore cannot conflict with FIFRA."). Similarly, in *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 886-87 (8th Cir. 2005), a pesticide-related personal injury case, the Eighth Circuit read *Bates* as *categorically* excluding design defect claims, and as a result, reversed a district court's pre-*Bates* holding that a purported design defect claim was actually based on a state-law duty to provide additional label warnings, and thus was preempted by § 136v(b). *See also Turner v. Chevron USA, Inc.*, No. B173622, 2006 WL 1314013, at *6 (Cal. Ct. App. May 15, 2006), *pet. for review denied* (Cal. Sup. Ct. Aug. 16, 2006) (No. 44553) (holding that "*Bates* puts to rest [the] contention that FIFRA expressly preempts Turner's claim for strict liability, design defect under the risk-benefit test," even though that test requires juries to examine the adequacy of label warnings). Not surprisingly, the trial bar has seized upon the same "requirement for labeling" passage in *Bates*. *See, e.g.*, Leslie A. Brueckner, *A Turning of the Tide for Preemption*, 41 Trial 28, 30 (Nov. 2005) ("The eagerly awaited decision . . . held 7-2 that common law design defect, manufacturing defect, negligent testing, and breach-of-express-warranty claims are *entirely exempt* from express preemption.") (emphasis added).

Justice Thomas, joined by Justice Scalia, filed in *Bates* a separate opinion which highlights the need for the Court to clarify that lower courts must analyze each claim, regardless of its name, form, or characterization, to determine whether it is based on a state-law rule that would impose requirements for labeling. In his opinion Justice Thomas noted that under § 136v(b), "States . . . may not impose liability for labeling requirements predicated on distinct state standards of care."

Bates, 544 U.S. at 455 (Thomas, J., concurring in the judgment in part and dissenting in part). Then he indicated that "the majority omits a step in its reasoning that should be made explicit: A state-law cause of action, *even if not specific to labeling, nevertheless imposes a labeling requirement* 'in addition to or different from' FIFRA's when it attaches liability to statements on the label that do not produce liability under FIFRA." *Id.* at 456. This "missing step" in the Court's *Bates* opinion—a step which the Court now should make explicit—flatly contradicts the state supreme court's view here that only claims which are "very directly related" or "directly addressed" to labeling can be preempted.

Review is needed to ensure that the lower court's misinterpretation of the *Bates*' test for preemption, an error which other courts also have committed, does not proliferate any further. This Court has not hesitated to clarify its federal tort preemption jurisprudence where, as here, it is necessary to aid the lower courts and litigants. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995) (clarifying discussion in *Cipollone*, 505 U.S. at 517, which courts of appeals had misconstrued to mean that inclusion in a statute of an express preemption clause forecloses implied preemption); *cf. United States v. Locke*, 529 U.S. 89, 107 (2000) (clarifying that a frequently cited "fragmentary quote from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) [regarding the "presumption against preemption"], does not support the scope given to it by the Court of Appeals"). CropLife America believes that it is important from the viewpoint of maintaining consistency in this Court's preemption jurisprudence that *Bates* not be misconstrued as elevating form over substance in determining whether a state-law cause of action is displaced. For this reason, the Court should grant review to clarify (or correct) *Bates*.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE LOWER COURT'S OPINION UNDERMINES THE STRUCTURE AND DISRUPTS THE OPERATION OF THE FEDERAL/STATE PESTICIDE REGULATORY SCHEME

CropLife America and its members view the Minnesota Supreme Court's decision in this nationwide class action as a serious threat to the structure and operation of the federal/state pesticide regulatory scheme. That court's post-*Bates* remand opinion, like its pre-*Bates* decision, upholds a jury verdict which requires an R&D-oriented pesticide manufacturer to pay tens of millions of dollars under a state consumer fraud statute on the theory that it engaged in an "unconscionable commercial practice" (i) by distributing a FIFRA-registered product with EPA-authorized and approved "subset" labeling only in states where the product had been registered, and (ii) by advocating against unlawful, potentially hazardous, off-label use of pesticides. If left undisturbed, this decision will continue to engender tremendous confusion and uncertainty within the regulated community, and in view of the potential financial rewards, almost certainly will spawn additional "consumer fraud" class action suits that further erode the pesticide regulatory scheme. *See, e.g.*, FarmLaw.com (hyping the farmers' trial court victory in the instant litigation).

1. The State Court's Opinion Abrogates the Important Role Played by the States in Registering Pesticides and the Need for Adequate Crop-By-Crop Testing on a Regional or Local Basis. Although § 136v(b) expressly preempts the states from imposing additional or different requirements for labeling, § 136v(a) specifies that they may "regulate the sale or use of any federally registered pesticide," provided that such regulation "does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a); *see Bates*, 544 U.S. at 446 n.20 (noting that "§ 136v(a) is merely declaratory of the au-

thority that the States retained after FIFRA"). Pursuant to this residual authority, the states have established their own individual state pesticide registration requirements, with which every FIFRA-registered product must comply prior to being sold or used. *See* Tr. at 2007:15-24; 2010:6-2011:1; 2068:5-2069:24; 2604:3-9; 2606:22-24; 2612:9-2613:7; 2615:13-2616:11 (testimony of parties' regulatory experts regarding state pesticide registration requirements geared to state and local agricultural and environmental conditions).

Under the federal/state scheme, a product *cannot* lawfully be marketed, advertised, sold, or used for a federally registered use (i.e., crop) in a particular state *unless and until* that state's pesticide regulatory agency, pursuant to the state's own pesticide registration requirements, has approved the product for that use in that state. In other words, a FIFRA registration *alone* is not a license to sell or use a pesticide product anywhere. *See Bates*, 544 U.S. at 442 & 442 n.14 (discussing the states' pesticide regulatory role); *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 613 (1991) ("FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides.").

Responsible product stewards like BASF extensively test their products for phytotoxicity (i.e., crop injury) on a crop-by-crop basis before making them available to farmers. Testing typically has to be conducted on a regional or local basis, in order to take into account differing soil, terrain, climatic, environmental, and other conditions. In addition, because farmers commonly "tank mix" different pesticide products prior to application, testing on various combinations of products often has to be conducted to ascertain whether a tank mixture will be phytotoxic when applied to crops grown in a particular region or state. The results of these and other types of phytotoxicity testing very well may determine the particular states in which a product should be sold and used, and thus, registered.

If a manufacturer chooses to refrain from marketing a FIFRA-registered product in Minnesota, North Dakota, or any other particular state, nothing in the statute requires the manufacturer to obtain a registration from that state. The lower court's ruling, however, appears to impose liability for BASF's forbearance from rushing to farmers a product which had not been fully tested, on a region-by-region basis, for phytotoxicity on minor crops. *See* Pet. at 5. Growers can hardly afford to destroy or damage their low-acreage minor crops with a product or tank mixture that has not been tested for crop safety under varying regional or local conditions. Nor can pesticide manufacturers bear that risk. Indeed, the state court's decision shatters whatever fragile incentives manufacturers like BASF may have for diverting limited R&D resources to development of test data needed to register new or existing pesticides for use on minor crops.[4] The ruling appears to impose financial liability upon BASF *for the very reason* that it made such an investment by registering its thoroughly tested Poast herbicide, on both a federal and state level, for use on dozens of minor crops, *see* Pet. at 4, but refrained from doing the same for the newer Poast Plus, which BASF indicates had not been adequately tested for phytotoxicity to minor crops, *id.* at 5. If the ruling is allowed to stand, the inevitable consequence will be that already scant incentives for manufacturers to develop or expand products for use on minor crops will evaporate. Many minor crop

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[4] Because of the long-standing need to maintain and bolster pesticide manufacturers' incentives to develop products suitable for use on minor crops, Interregional Research Project No. 4 ("IR-4") was established in 1963 as a cooperative effort between USDA and state agricultural research centers. *See* Tr. at 3245. IR-4 Executive Director Robert Holm testified at the trial below that the program's "sole purpose is to provide crop-protection solutions for minor crop growers, the rationale being that . . . crop-protection companies *lacked the economic incentive* to develop their chemicals on minor crops." *Id.* at 3246 (emphasis added).

growers throughout the nation then will be deprived of the pesticide products that they need.

2. In Violation of § 136v(b), the State Court's Opinion Imposes Liability for a Manufacturer's Use of EPA-Authorized Subset Labeling, Which Is an Essential Component of the Federal/State Regulatory Scheme, and Until Now, a Common and Beneficial Commercial Practice. The lower court's holding that a pesticide manufacturer's use of EPA-authorized subset labeling somehow represents an "unconscionable commercial practice," punishable by payment of treble damages under a vague state consumer protection law, thwarts the objectives of this necessary and widely utilized federal labeling practice, which is highly beneficial to farmers and other pesticide users, as well as to manufacturers.

EPA's long-standing subset labeling regulation allows a pesticide manufacturer to distribute a product with labeling that lists less than all of its FIFRA-registered uses:

> A registrant may distribute or sell a product *under labeling bearing any subset* of the approved directions for use, provided that in *limiting the uses listed on the label*, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

40 C.F.R. § 152.130(b) (emphasis added). In other words, EPA does not require the labeling accompanying a pesticide product to identify all of the uses (i.e., crops) encompassed by that product's FIFRA registration.

Without subset labeling, a manufacturer would have to list all FIFRA-registered crops, even those for which a registration has not been sought or obtained in a particular state. Selling the product with such all-encompassing labeling would violate that state's registration requirements. As a result, the manufacturer could not lawfully sell the product at all within that state, not even for use on the crops which have

received the st[illegible]s approval. Farmers then would be deprived of beneficial crop protection products. Alternatively, a manufacturer could seek state registration before a product is fully tested for use on specific crops under the soil, climatic, environmental, and other conditions present in the particular state or region. That, too, would be problematic for both farmers and manufacturers. Therefore, subset labeling is a *regulatory necessity*. It enables a FIFRA-registered product to be sold for those crops which have received state as well as EPA approval, while avoiding violation of state registration requirements for other crops. Equally important, it affords a manufacturer the opportunity to complete safety testing of the product on such other crops before seeking state registrations.

Subset labeling also is important for commercial reasons. When EPA promulgated the subset labeling regulation in 1988, it formalized a long-standing policy which affords manufacturers flexibility in deciding how to market multi-use (e.g., multi-crop) products. *See* 53 Fed. Reg. 15,952, 15,957 (May 4, 1988) ("A company having a registered product is permitted (both by current policy and by this final rule) to market the product in a variety of ways."). Thus, a "product may be marketed . . . *bearing different subsets of approved uses* . . . to distinguish primary uses for different regions of the country." *Ibid.* (emphasis added). For example, utilizing subset labeling, a manufacturer is permitted to sell the same herbicide product in Mississippi labeled only for use on cotton and in Iowa labeled only for use on corn. Along the same lines, subset labeling affords a manufacturer the flexibility to address special regional or local considerations (e.g., soil types, climatic parameters, pest biotypes, and presence of endangered species) for safe and efficacious use of a product on a particular type of crop.

Also, a pesticide product's FIFRA registration may cover both agricultural crop uses and non-agricultural uses (e.g., home, lawn, and garden uses). In such a case, a manufacturer

can use subset labeling to distinguish between the agricultural and non-agricultural uses of the same product, which might be packaged (as well as labeled) differently for each category. Without subset labeling, manufacturers would have to try to obtain multiple FIFRA registrations for the same product in order to avoid including agricultural and non-agricultural uses on the same labeling. But "[e]xpanding usage of a single product is often more desirable from a marketing perspective (and usually easier to accomplish) than registering a number of similar products, each with fewer uses." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Thus, subset labeling conserves EPA's limited resources and provides a way for manufacturers to select from among a product's EPA-approved uses, those that meet the needs of different types of users.

The opinion below severely disrupts the federal/state regulatory scheme by rendering use of subset labeling a perilous practice. Yet, the subset labeling regulation, which specifically authorized BASF to omit minor crop uses from its Poast Plus labeling, necessarily represents EPA's determination that including less than all FIFRA-registered crops on an agricultural pesticide product's labeling does *not* render that labeling deceptive (i.e., misbranded). As a result, any state-law claim, such as Respondents' claims here, which are based on a duty requiring a manufacturer to list all FIFRA-registered crops on a pesticide product's labeling, necessarily imposes a requirement for labeling which is *not* "equivalent to, and fully consistent with, FIFRA's misbranding provisions," *Bates*, 544 U.S. at 447, but instead, "diverges from [the labeling requirements] set out in FIFRA and its implementing regulations," *id.* at 452. Such claims, therefore, are expressly preempted by § 136v(b) under the *Bates* test.[5]

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[5] For similar reasons, Respondents' claims that it was deceptive for BASF not to label Poast Plus the same as Poast also are preempted because they are based on duties which diverge from EPA's requirements (i) that separately registered products be distributed with their own sepa-

3. The State Court's Opinion Imposes Liability for Advocating Compliance With, and Facilitating Enforcement of, FIFRA's Prohibition Against Misuse of Pesticides, Which Is a Fundamental Precept of the Federal/State Regulatory Scheme. FIFRA makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). One egregious example of such unlawful misuse is applying a pesticide to a crop that is not listed on its labeling.

Nevertheless, Respondents contended at trial that BASF engaged in "unconscionable" conduct by reminding farmers that off-label use of pesticides (e.g., use of a pesticide product on crops not included on its labeling) is unlawful, and by providing information to state pesticide enforcement officials, which led to prosecutions of certain pesticide dealers and farmers for off-label use. *See* Pet. at 8, 24. The opinion below held that this conduct was "deceptive," Pet. App. at 15a, and affirmed imposition of state-law liability based in part on these activities.

Off-label use (i.e., misuse) of agricultural pesticide products can cause serious problems such as crop damage, illegal pesticide residues in food crops, pesticide drift or runoff, and hazards to applicators, bystanders, domestic animals, and wildlife. The lower court's ruling, which appears to impose liability upon BASF for advocating against the off-label use of pesticides, sends shockwaves through the federal/state regulatory structure. If left undisturbed, the opinion below will leave manufacturers with the choice of either looking the other way when they suspect that their products are being

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rately approved labeling, *see* 40 C.F.R. §§ 152.130(a), 156.10(a)(1), and (ii) that to avoid confusion, different products be distributed with different names, *see* EPA Label Review Manual (3d. ed. 2003), Ch. 12: Labeling Claims, at Part IV.C ("The exact same name cannot be used for different products registered by any one registrant. The product name must be sufficiently different to clearly distinguish one product from another.").

misused, or incurring the risk of massive state-law liability by reporting possible misuse. Either way, the impact of the state supreme court's opinion severely undermines FIFRA's prohibition against misuse of pesticides.

FIFRA's prohibition against using a pesticide in a manner inconsistent with its labeling is commonly known by the maxim "The Label is the Law." During the trial court proceedings below, Dan Barolo, who served as Director of EPA's Office of Pesticide Programs, testified that "[t]he absolute underpinning and foundation of the program is embodied in this particular statement." Tr. at 2556. The record of this case reflects that when North Dakota's agriculture commissioner requested EPA to provide an "enforcement waiver" so that farmers could violate § 136j(a)(2)(G) by applying Poast Plus for crops not listed on its labeling, Dr. Lynn Goldman, EPA's then Assistant Administrator for pesticides, responded as follows:

> It is critical for us to keep in mind that, under FIFRA, *the label is the law*. . . . To move away from this basic precept and inform farmers that it is acceptable to substitute different products with different approved labels has serious national implications with regard to the health and safety of farmers and workers. . . . If EPA were to *undermine the basic understanding by farmers that they must follow the labeling on a specific product,* we would cause confusion in the regulated community, and, in effect, *be encouraging pesticide misuse.*

Def. Ex. 636 (emphasis added). By holding a pesticide manufacturer liable under state law for discouraging the misuse of agricultural pesticides, the state court's opinion causes the exact type of "serious national implications" and "confusion in the regulated community" which EPA sought to prevent by refusing an enforcement waiver for off-label use of Poast Plus. Furthermore, Congress decided to rely upon *the states* to enforce FIFRA's prohibition against misuse of

pesticides. *See* 7 U.S.C. § 136w-1(a) ("State Primary Enforcement Responsibility"). The lower court's opinion warrants this Court's review because it flouts that important state enforcement responsibility by condoning imposition of state-law liability on a manufacturer for promoting compliance with pesticide labeling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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